STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company,)
AT&T Communications of Illinois, Inc.,)
TCG Illinois, TCG Chicago, TCG St. Louis,)
CoreComm Illinois, Inc., WorldCom Inc.,)
McLeodUSA Telecommunications Services, Inc.,)
XO Illinois, Inc.,)
Northpoint Communications, Inc.,)
Rhythms NetConnection and Rhythms Links, Inc.,)
Sprint Communications L.P.,)
Focal Communications Corporation of Illinois, and)
Gabriel Communications of Illinois, Inc.)
)
) Docket No. 01-0120
Petition for Resolution of Disputed Issues)
Pursuant to Condition 30 of the)
SBC/Ameritech Merger Order)
)
)

REPLY TO BRIEFS ON EXCEPTIONS

OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

SEAN R. BRADY
NORA A. NAUGHTON

April 29, 2002

Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C 800
Chicago, Illinois 60601
March 22, 2002
T: 312/ 793.2877
F: 312/ 793.1556

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The Staff of the Illinois Commerce Commission ("Staff"), by and through its attorneys, and, pursuant to 83 Ill. Admin. Code 200.830 and at the direction of the Administrative Law Judges ("ALJs"), submits its Comments on the Post Order Calculation performed by Ameritech, and its exceptions to the Proposed Order in this proceeding.

I. ARGUMENTS

Staff is responding to all three of Ameritech's exceptions and its interpretation of the Commission approval of the Texas Plan, and one Illinois CLEC exception.

1. AMERITECH's REVISIONS TO THE "OPT IN" NEED TO BE MODIFIED TO PROPERLY INCORPORATE STATE TARIFFING REQUIREMENTS

The Staff did not address "opt-in" during the hearing and BOEs. Staff, however, agrees, in concept, with the CLECs' "opt-in" proposal, and the Proposed Order's findings. Based upon certain recommendations Ameritech makes in its BOE, the Staff is, however, compelled to clarify several points with respect to this issue.

Ameritech proposes to clarify an ambiguity that it perceives to exist in Section 5.5 of the Modified Ameritech Illinois Performance Remedy Plan ("Modified Remedy Plan" or "Modified Performance Remedy Plan") set forth in Attachment A of the Proposed Order; however, it limits its statements to interconnection agreements and does not address the role of the tariffed remedy plan. From these statements it appears to the Staff that Ameritech's suggested changes significantly alter the scope and applicability of the Remedy Plan[1]. Moreover, Ameritech's proposal appears to fly in the face of the requirement that telecommunications services, as defined in the Public Utilities Act, be tariffed. *See* 220 ILCS 5/13-501(a).

Ameritech argues, in its BOE, as follows:

> The Commission should revise the Proposed Order to clarify three aspects of how the "opt-in" procedure would work in practice. First, a number of CLECs already have language in their interconnection agreements that incorporates the existing Remedy Plan. *See* Tr. 142: "we do have an amendment in Illinois for AT&T and for TCG." To avoid any ambiguity as to which plan is in effect, the Proposed Order should be clarified so that when a CLEC "opts in" to the revised Remedy Plan, (i) that Plan supersedes the plan previously in effect for such CLEC, and (ii) the CLEC and Ameritech Illinois will then follow the opt-in with an amendment to any existing remedy plan language in their interconnection agreements. The amendment will not delay the effective date of the CLEC's "opt- in" – it will merely clarify the effect of the opt- in, and assist CLECs in evaluating existing interconnection agreements for purposes of adopting them via section 252(i) or a "Most Favored Nation" ("MFN") procedure.

Ameritech BOE at 33

Under Section 13-501(a) of the Public Utilities Act, all terms and conditions of a telecommunications service must be tariffed.

Section 13-501(a) of the Public Utilities Act provides, in relevant part, that:

> No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical area or areas in which the service shall be offered or provided.

220 ILCS 5/13-501(a)

[1] It is possible that the Staff has significantly misapprehended Ameritech's position regarding tariffing. However, based upon Ameritech's assertions in other matters, this appears unlikely.

Ameritech's BOE, however, leads the Staff to conclude that Ameritech intends to offer the Remedy Plan *only* through the interconnection process, and does not propose to file a compliance tariff. This is clearly contrary to Section 13-501. Accordingly, as a pure state law matter, the Commission should require Ameritech to tariff the Remedy Plan that results from this proceeding. This is clearly the reason the Plan *must* be tariffed, although it is not, however, the only reason the Commission *should* require tariffing of the Plan.

In addition, Section 13-203 of the Public Utilities Act provides, in relevant part, that:

> Telecommunications service. "Telecommunications service" means the provision or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of information, by means of electromagnetic, including light, transmission with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) used to provide such transmission and **includes access and interconnection arrangements and services**.
>
> 220 ILCS 5/13-203 (emphasis added)

It is clear that any Remedy Plan resulting from this proceeding is an "access [or] interconnection arrangement [or] service" within the meaning of Section 13-203 of the Public Utilities Act, and is accordingly fully subject to the tariffing requirements of Section 13-501.

Ameritech apparently takes the position that tariff requirements are rendered meaningless by the federal Telecommunications Act. This position, however, should be rejected. Recently, the District Court of Appeals for the Tenth Judicial District has ruled that nothing in the Telecommunications Act prohibited a state commission from permitting CLECs that had concluded interconnection agreements with an ILEC to "opt into" tariff provisions. *US West v. Sprint*, 275 F.3d 1241, 1249-50 (10th Cir. 2002). In doing so, the court rejected ILEC arguments that such a requirement would negatively impact negotiation of interconnection agreements, *US West*, 275 F.3d at 1250, and would permit CLECs to bypass interconnection agreements. *Id*. Significantly, the court further noted that:

> Although Qwest [US West's assumed business name] repeatedly asserts that the tariff opt-in provision allows Sprint to bypass its interconnection agreement, we disagree. The fact is that the CPUC is imposing an alternative price/term scheme as part of the interconnection agreements. **Thus, under the terms of the interconnection agreement, Sprint can purchase services at specific rates and terms listed in its interconnection agreement, or, alternatively, can purchase services at the rates and terms set forth in Qwest's tariffs. Either way, Sprint is acting through its interconnection agreement and with the approval of the CPUC**.
>
> *US West*, 275 F.3d at 1250-1 (emphasis added).

The *US West* court's point is a vital one: since both tariffs and interconnection agreements are approved by state Commission's, a tariffing requirement, and indeed, a ruling that permits CLECs with interconnection agreements to opt into tariffs, simply does not run afoul of the federal Telecommunications Act.

It is clear, therefore, that tariffing is not some arcane requirement without current relevance or applicability; rather, a tariff can constitute an important component of interconnection agreements. The Commission should, therefore, require Ameritech to tariff the Plan, as a matter of law and sound policy.

Moreover, the current remedy plan implemented pursuant to Condition 30 ("Existing Remedy Plan") is tariffed. As the Staff stated in its BOE, Ameritech should be ordered to replace that tariff with a tariff compliant with this order. Staff BOE at 62-63. As noted above, Staff's recommendation is, at a minimum, required by state law. The tariffing of the Modified Remedy plan would allow carriers who do not have an interconnection agreement with Ameritech to purchase out of the tariff. Requiring Ameritech to revise its tariff in accordance with this Order will allow carriers with existing interconnection agreements to easily update their existing interconnection agreement by "opting-in" to the new plan that is also reflected in the tariff. Pending the filing of such a tariff, the Modified Remedy Plan ordered in this docket could be offered through the "opt-in" procedures set forth in the Proposed Order.

Staff agrees that with respect to those CLECs that would opt-in to the Commission modified Remedy Plan via existing interconnection agreements containing applicable notice provisions, the notice provisions of such interconnection agreements should be used for the sake of ease and clarity. With respect to those carriers that take out of the tariff or opt-in to the remedy plan via an interconnection agreement that does not contain applicable notice provisions, Ameritech should designate an address for notice purposes.

Exception Language

Staff therefore proposes the following modification to (Note -- all of Staff's changes are in bold, and double underscored):

(a) Section (C)Staff Position, on page 15 of the Proposed Order;

> **~~Staff took no position on this issue.~~ <u>Staff agrees with the CLEC proposal to add an "opt in" provision to the Modified Performance Remedy Plan. Staff states that the "opt in" will allow carriers with existing interconnection agreements to easily update their existing interconnection agreement by "opting-in" to the new</u>**

plan that is also reflected in the tariff. Furthermore, Staff recommends that Ameritech also be required to revise its existing tariff in accordance with this Order. This will ensure that those carriers that do not have an interconnection agreement with Ameritech will have the benefit of the remedy plan. Additionally, Staff proposes that pending the filing of such a tariff, the Modified Remedy Plan ordered in this docket be offered through an "opt-in," then the parties could "opt-in" to the tariffed remedy plan.

(b) Section (D) Commission Analysis and Conclusions on page 15 of the Proposed Order;

The method for **allowing carriers with existing interconnection agreements to** "opt~~ing~~ in" to ~~a~~ **the Modified Performance** Remedy Plan ought to be a simple matter that is easy to execute. The CLECs contend that the current system **to amend existing interconnection agreements** is unnecessarily complicated and drawn out, and that it needs to be changed.

While Ameritech wishes to keep the current system, which involves an Amendment to an Interconnection Agreement, it did not present any evidence establishing the need for execution of a separate Amendment. Logically, there would be no need for such an Amendment, as the terms of the Performance Remedy Plan are contained in the Plan, unless matters additional to what is provided in the Plan were negotiated by the parties.

However, "opting in" should not be automatic, as a CLEC should be able to choose not to "opt in" the **Modified** Performance Remedy Plan. The intent of the "opt in" is to allow the CLEC to "opt in" to the Performance Remedy Plan Modified in this Order. **To expedite the ability of CLECs to receive the Modified Performance Remedy Plan ordered in this docket, the Modified Plan in Attachment A shall be offered to CLECs with existing interconnection agreements through the described "opt-in" process, pending the filing and approval of a tariff that complies with this Order.** We conclude that the language cited above in the CLEC remedy plan**, as modified by Staff's comments,** allows CLECs to "opt in" the **Modified Performance Remedy P**~~p~~lan easily and without delay. The CLEC method also still allows the option not to "opt in." The following language should replace Section 5.5 of the Plan:

A CLEC wishing to be subject to **the Ameritech Illinois Performance Remedy Plan tariffed with the Illinois Commerce Commission** ~~**remedy plan**~~ must notify SBC/Ameritech ~~**(pursuant to the "Notice" provision in that CLEC's interconnection agreement with**~~

~~**Ameritech Illinois, with a copy to Ameritech Illinois's Regulatory Offices)**~~ and the Commission, in writing, of its intent to "opt-in" ~~**the**~~ **to such** Remedy Plan. **Notice to SBC/Ameritech shall be made, in the case where a CLEC purchases out of the tariffed plan, at the place of notice designated by Ameritech in the tariff and in the case where a CLEC opts-in to the plan through an interconnection agreement, pursuant to the "Notice" provision in that CLEC's interconnection agreement with Ameritech Illinois, with a copy to Ameritech Illinois's Regulatory Offices**. The CLEC's "opt-in" becomes effective 20 days from the date of filing said written notice with the Commission, and supersedes the plan previously in effect for that CLEC. Remedies shall be calculated in accordance with the Remedy Plan beginning with the first full calendar month following the effective date. Voluntarily negotiated amendments also must be filed with the Commission, although such amendments are subject to Commission approval.

(C) Section 5.5 of Proposed Order, Attachment A -- Modified Ameritech Illinois Performance Remedy Plan,

A CLEC wishing to be subject to **the Ameritech Illinois Performance Remedy Plan tariffed with the Illinois Commerce Commission** ~~**remedy plan**~~ must notify SBC/Ameritech ~~**(pursuant to the "Notice" provision in that CLEC's interconnection agreement with Ameritech Illinois, with a copy to Ameritech Illinois's Regulatory Offices)**~~ and the Commission, in writing, of its intent to "opt-in" ~~**the**~~ **to such** Remedy Plan. **Notice to SBC/Ameritech shall be made, in the case where a CLEC purchases out of the tariffed plan, at the place of notice designated by Ameritech in the tariff and in the case where a CLEC opts-in to the plan through an interconnection agreement, pursuant to the "Notice" provision in that CLEC's interconnection agreement with Ameritech Illinois, with a copy to Ameritech Illinois's Regulatory Offices.** The CLEC's "opt-in" becomes effective 20 days from the date of filing said written notice with the Commission, and supersedes the plan previously in effect for that CLEC. Remedies shall be calculated in accordance with the Remedy Plan beginning with the first full calendar month following the effective date. Voluntarily negotiated amendments also must be filed with the Commission, although such amendments are subject to Commission approval.

2. THE COMMISSION SHOULD REJECT AMERITECH's ARGUMENT TO REDUCE TIER 1 AND TIER 2 PAYMENT AMOUNTS

Ameritech recommends that the Commission reject the Proposed Order's increase of the Tier 1 and Tier 2 payments set forth in the remedy plan currently in operation ("Existing Remedy Plan"). Ameritech argues that there is no factual and legal support for the increase in payments, and that the existing plan provides sufficient incentive for Ameritech act in a non-discriminatory manner. Ameritech BOE at 18-22. Ameritech is incorrect for three reasons. First, the facts support increasing both Tier 1 and 2 payments. Second, Ameritech interprets Tier 1 and 2 payments as if they are payments to be made pursuant to a contractual agreement. They are not, because the Modified Ameritech Illinois Performance Remedy Plan ("Modified Remedy Plan" or "Modified Performance Remedy Plan") in Attachment A of the Proposed Order requires Ameritech to make Tier 1 and Tier 2 payments pursuant to a Commission order, and not an agreement. Finally, Ameritech's justification for the continued use of a current remedy payment amounts is based on an improper standard and is misleading. As a result of these fundamental misinterpretations, Ameritech's analysis of the increase in Tier 1 and Tier 2 payments is flawed, and therefore its arguments should be disregarded.

A. <u>The Illinois Plan was not intended to be the same as the Texas Contract</u>

Ameritech's arguments to reduce the increase of Tier 1 and Tier 2 payments are generally based on the assumption that the remedy plan approved by the Commission operates under the same legal framework as the Texas Remedy Plan ("Texas Plan"), or other states -- it does not. Ameritech BOE at 18-23. There are a number of differences between the Texas Remedy Plan and the Modified Performance Remedy Plan that recognize that the Modified Performance Remedy Plan is not a contract or an agreement, as Ameritech arguments assume.

The key distinction between the remedy plan implemented pursuant to this proceeding and the remedy plan put in place in Texas, is that the Ameritech Illinois remedy plan is a tariffed plan, put in place through the Commission's *Merger Order*, and modified pursuant to Commission order—not, as in Texas, through a voluntary agreement with the state commission in order to obtain 271 approval. *See* Direct Testimony Ameritech Witness Dysart at 5 (stating that Southwestern Bell Telephone and the Texas Public Utility Commission agreed upon the plan through a memorandum of understanding). Neither, Staff nor the CLECs have agreed with Ameritech upon a remedy plan to be put in to place in fulfillment of Condition 30 of the *Merger Order* (otherwise we probably would not be here). *Joint Petition* at ¶3.

Condition 30 offered the opportunity for an agreed upon remedy plan in Illinois but the parties could not reach such an agreement in the collaborative workshops. Ameritech could not, however, come to agreement with any of the CLECs. As a result, the parties opted to avail themselves of the procedure set forth in the *Merger Order*; i.e., to litigate the remedy plan issues before the Commission. As such, the Modified Remedy Plan is not an agreement, but an order of the Commission, and as a Commission order, principles of contract law are not properly applied. Ameritech cannot now conveniently argue that it must agree with the provisions of the Commission's order in this proceeding, before it is required to comply with it. Such thinking would render the Commission's order meaningless. Furthermore, if Ameritech can selectively comply with the Commission's order, under the theory that the remedy plan is a contract to which Ameritech must consent, so can the CLECs under the same theory. If it is a contract, then both parties must agree. If Ameritech's theory is adopted, the result is that nothing would be accomplished by this order.

Other significant differences between the plans, is that the remedy plan implemented in Texas was voluntarily implemented pursuant to a 271 filing[2], and federal guidelines, whereas the Modified Performance Remedy Plan is pursuant to state law and is a condition of the SBC/Ameritech merger. *Merger Order* at §III(I)(2)(h).

Since Ameritech is arguing that certain elements of the remedy plan are contractual in nature, Ameritech may also be assuming that this proceeding is a Commission review of a contract. Any assertion by Ameritech that this proceeding is a review of a contract or agreement must, however, fail. The Joint Petition resolves this matter, since the petition has clearly limited this proceeding to deciding the appropriate remedy plan Ameritech is to implement in Illinois. *Joint Petition* at ¶3. The Joint Petition makes no request for review under Section 252 of the Telecommunications Act of 1996. 47 U.S.C. §252 (granting state commission's authority to resolve interconnection issues through arbitration). As such, Ameritech is foreclosed from arguing that this hearing requests the Commission to approve any form of contract or interconnection agreement under TA96. *See* 83 Ill. Adm. Code Part 200.100 (pleadings to state the specific relief sought). Rather, Ameritech agreed to implement in Illinois an Illinois remedy plan as a condition to approval of its merger with SBC, and tariffed a modified Texas Plan until the collaborative and the resulting litigation finalized the Illinois plan.

Furthermore, there is a clear distinction between a contract, and the state's authority to implement a procedure to protect the beneficiaries of an agreement. It is important to remember – as Ameritech apparently does not – that contracts of many different types are subject to regulation by states, both with respect to terms and conditions, and with respect to the amount of damages. For example, many consumer credit arrangements are subject to the Truth-in-Lending Act (TILA). *See, generally*, 15 U.S.C. §1601 *et seq*. Under TILA, individual persons aggrieved by violations of the Act are entitled to damages that include actual damages, statutory damages equal (in most cases) to twice the applicable finance charges, and attorneys' fees. 15 U.S.C. §1640(a). These damages may be imposed notwithstanding the agreement of the parties to the contrary, and clearly need not relate to any harm or loss suffered by the aggrieved party.

Numerous similar state laws impose statutorily-mandated damages notwithstanding agreement of the parties. *See, e.g.*, Pay-per-Call Services Consumer Protection Act, 815 ILCS 520/1; 520/15(a) (governs agreements to provide pay-per-call services; aggrieved party entitled to three times actual damages plus attorney's fees); Credit Services Organizations Act, 815 ILCS 605/1, 605/11 (governs contracts to improve credit history; aggrieved party entitled to actual damages, punitive damages, costs and attorney's fees); Dance Studio Act, 815 ILCS 610/1, 610/10 (governs contracts for dance lessons; aggrieved party entitled to three times actual damages, costs and attorney's fees); Dating Referral Services Act, 815 ILCS 615/1, 615/45 (governs dating service contracts; aggrieved party entitled to three times actual damages, costs and attorney's fees); Fair Invention Development Standards Act, 815 ILCS 620/101; 620/508 (governs contracts between inventors and entities that develop

[2] Direct Testimony Ameritech Witness Dysart at 3.

commercial interest in inventions; aggrieved party entitled to three times actual damages, costs and attorney's fees, or $3,000, whichever is greater); Physical Fitness Services Act, 815 ILCS 645/1, 645/11 (governs contracts for health club memberships and similar services; aggrieved party entitled to three times actual damages, costs and attorney's fees). In fact, even the Telecommunications Act of 1996 expressly allows state commissions to impose terms and conditions upon parties unable to reach agreement on specific issues in arbitrated interconnection agreements. See §252(b)(4)(c). Further, Section 252 (e)(2)(A) of the Act invests state commission with the authority to reject a "voluntarily" negotiated interconnection agreement, if the agreement, among other reasons, is "not consistent with the public interest, convenience, and necessity." Moreover, Section 252(e)(3) specifically reserves the authority of the state commission to establish or enforce other requirements of state law in its review of an interconnection agreement including requiring compliance with intrastate service quality standards or requirements. 47 U.S.C. §252(e)(3). In other words, Ameritech's view of the law of contracts does not appear to take into account any of the legal developments that have taken place since about 1996. It is extraordinarily well established that states can and do, provide by law for damage awards between contracting parties notwithstanding the parties' agreement. Therefore, the state has traditionally had authority to implement mechanisms separate from the agreement to protect the parties ability to bargain.

The method in which Ameritech currently offers the remedy plan is through tariffs and interconnection agreements. Given this, Staff's recommendations in its BOE, and in this brief, recognize that fact, and propose keeping the status quo by having

Ameritech modify its tariff to comply with this order and offer an "opt-in." *See* Staff BOE at 62-63 (recommending tariff); *see also supra* § 2 (responding to Ameritech's changes to the Proposed Order's findings regarding "opt-in"). Staff agrees with the Proposed Orders findings regarding "opt-in", since it permits CLECs who currently have interconnection agreements with Ameritech to substitute their current remedy plan for the Modified Remedy Plan approved in this proceeding.

Since the Modified Remedy Plan is not a contract or an agreement, the liquidated damages (Tier 1) provisions and assessments (Tier 2) should be revised to simply be considered payments ordered by the Commission. The Commission has ordered that a remedy plan be put in place using the Texas Remedy Plan as the starting point. *Merger Order*, at §III(I)(2)(h) p. 218. The purpose of the remedy plan is "to provide incentive to Ameritech to provide measurably 'good' service in its provision of wholesale services." Staff Ex. 2.00 at 9; *see also* 220 ILCS 5/13-102(d) (expressing state interest in establishing policies necessary to open telecommunications markets to competition to ensure that Illinois consumers will realize the economic benefits).

Staff recommended using the Texas Remedy Plan as a starting point for the remedy plan Ameritech will implement in Illinois. Staff Ex. 2.00 at 44. The Remedy Plan proposed by Ameritech had Ameritech making payments to both CLECs (Tier 1) and the state (Tier 2). The Tier 1 payments have the effect of reasonably compensating the CLEC when it receives poor performance from Ameritech, and Tier 2 payments are intended to provide Ameritech with incentive to provide better service across the board to all CLECs by requiring payments to the State. Staff Ex. 2.00 at 9-10. The Tier 2 payments are "responsive to industry-wide provisions, and are paid to the state when poor service to the industry as a whole is detected." Staff Ex. 2.00 at 9.

The amount of the Tier 1 payments to the CLECs should not be limited by the legal principles of liquidated damages, since this is not a contract. Staff agrees, however, with the Proposed Order's finding (although for a different reasons, Staff BOE at 47-48) that the amount of Tier 1 payments to the CLEC should be an amount of money equal to the harm they suffer. This proposition is reasonable, since the carrier experiences some amount of financial loss due to Ameritech's actions, and it would be unreasonable to provide the CLEC compensation that is greater that what is determined to be a reasonably forecasted loss. *See* Staff BOE at 48-50 (discussing why the amount is undefinable and providing a reasonable approximation of the loss).

Therefore, to the extent Ameritech's arguments regarding Tier 1 payments rely on the legal principles of liquidated damages, they should be disregarded since the Modified Remedy Plan is not operating under contract law. For similar reasons, Staff has clarified the interpretations and effect of Tier 1 and Tier 2 payments above, and in its BOE, so that they will not be interpreted as liquidated damages or assessments, but payments ordered by the Commission to accomplish the purposes explained above. Additionally, Staff clarified that tripling the Tier payments are reasonable approximations of the forecasted compensation for the harm a CLEC might suffer due to poor performance of Ameritech. Staff BOE at 46-50.

B. <u>Ameritech Improperly Argues Liquidated Damages, Fines and Forfeitures</u>

In its BOE, Staff took exception (Staff Exception 5) to the Proposed Order to clarify the use of certain terminology found throughout the Proposed Order and the

Remedy Plan. Staff BOE at 52. As Staff noted in its BOE, the parties, including Staff, used terminology somewhat loosely regarding the Remedy Plan, which loose usage understandably leaked into the Proposed Order. *Id*. Staff was particularly concerned that the Proposed Order appears to use the words or phrases "liquidated damages," "compensatory damages" and "penalties" interchangeably. These terms, as terms of art under contract law, may have been inadvertently misused in the context of the Remedy Plan.

In fact, the parties' BOEs demonstrate exactly why Staff sought clarification of the Tier 1 and Tier 2 payment terminology. For instance, Ameritech seizes upon the term "liquidated damages" as the keystone of its argument that Tier 1 payments should not be doubled. In support of its position, Ameritech notes "the Proposed Order quite properly refers to such [Tier 1] payments as liquidated damages." Ameritech BOE at 18. Ameritech then contends that Tier 1 payments cannot be multiplied because liquidated damages need to bear a reasonable relation to the damages they are supposed to compensate. *Id*. Ameritech is half-right; liquidated damages do need to be reasonably calculated in light of the anticipated loss. Liquidated damages, however, "may not be a penalty to punish nonperformance or as a threat used to secure performance." *See e.g., Med+Plus Neck and Back Pain Center v. Noffsinger*, 311 Ill. App. 3d 853, 860 (2nd Dist. 2000); *Grossinger Motorcorp v. American Nat'l Bank & Trust*, 240 Ill. App. 3d 737, 750 (1st Dist. 1992); *Stride v. 120 West Madison Building*, 132 Ill. App. 3d 601, 605 (1st Dist. 1985). Ameritech itself, repeatedly acknowledges that the purpose of the Tier 1 and Tier 2 payments is to secure performance. *See* Ameritech BOE at 3, 10, and 22, quoting from the *Merger Order* ("the Commission expressly stated that its purpose in adopting the Remedy Plan was not to penalize the company but rather to have compliance with our order.'")[3]. Since liquidated damages provisions are unenforceable if used primarily to provide incentive for performance, which Ameritech repeatedly acknowledges is the case in the Remedy Plan, and which Staff agrees with, Staff believes the usage of the term "liquidated damages" in the Proposed Order is inappropriate.

The Illinois CLECs,[4] point out that Ameritech has argued in other jurisdictions that the remedies in remedy plans are "liquidated damages," which, under contract law, requires Ameritech's consent to the remedy plan for the remedy plan to be lawful and enforceable. Illinois CLEC BOE at 16-20. For the record, Staff, like the Illinois CLECs, disagrees with the Ameritech's "consent" theory. Nonetheless, Staff, in order to eliminate unnecessary confusion, urges the Commission to eliminate all references to "liquidated damages" in the Proposed Order and in the Remedy Plan itself.

Likewise, Ameritech argues that Tier 2 payments should not be multiplied. Ameritech seizes upon the Proposed Order's usage of the terms "regulatory fines or forfeitures" in reference to Tier 2 payments, to anchor its argument. Ameritech contends that "fines or forfeitures" indicate "punishment for some offense," which is contradicted by language in the *Merger Order* disclaiming any intent to punish Ameritech. Ameritech BOE at 19-20. As clearly demonstrated in the BOEs, Ameritech's "liquidated damages," "consent" and "fines or forfeitures" arguments are exactly the type of unnecessary confusion that Staff believes should be avoided. Staff

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[3] *See also* Ameritech BOE at 7, *quoting from the Merger Order* ("our goal is to ensure . . . that enforcement measures are adequate to ensure full compliance with the conditions") and 10, *quoting the FCC* ("remedies should provide 'a meaningful and significant incentive to comply with the designated performance standards'").

BOE at 52-56. Moreover, there is no compelling substantive reason to retain these troublesome terms.

As requested in its BOE, Staff urges the commission to eliminate the terms "liquidated damages," "compensatory damages" and "penalties" and "fines and forfeitures" from the Proposed Order and the Remedy Plan. Instead of using the above-noted problematic terminology, Staff recommends that the Proposed Order and the Remedy Plan utilize the phrases "CLEC payments" or "Tier 1 payments" when referring to Tier 1 payments. Staff also recommends that the Proposed Order and the Remedy Plan utilize the phrases "General Revenue Fund Payments" or "Tier 2 payments" when referring to Tier 2 payments. Ameritech's arguments should be disregarded since they are inconsistent and improperly apply the principles of contract law to the instant matter.

C. Ameritech's 'A-Minus' Evaluation does not Accurately Depict Whether the Texas Remedy Plan will Provide Meaningful Incentives for Ameritech to Maintain Service Quality Levels in Illinois

Ameritech attempts to justify the amount of the payments made under the current remedy plan as being reasonable by stating that payments under the Modified Remedy Plan are "vastly out of step with 'A-minus' performance." Ameritech BOE at 21. This comparison is uninformative and not supported by law. Ameritech argues that the existing plan would result in payments of around $2.9 million per month, and that this is sufficient to motivate it to comply with the Commission's order. Ameritech BOE at 21-22. Ameritech argues that in contrast, the Modified Remedy Plan punishes Ameritech since it would require Ameritech to pay nearly $17 million over three months, which it states is "out of step" with its A-minus performance. *Id*. (stating that an 89% "Pass

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[4] AT&T, McLeodUSA and WorldCom collectively filed a Brief on Exceptions ("Illinois CLEC BOE").

Rate[5]" is A-minus performance). Comparing the amount of Ameritech's payments to its performance, as Ameritech proposes this Commission should accept, is a misleading comparison.

In responding to Ameritech's arguments, first, an 89% pass rate is still less than 100% compliance with the performance measurement standards that were agreed upon by Ameritech. Direct Testimony of Ameritech witness Salvatore Fioretti at 5 (stating Ameritech and CLECs agreed to performance measures through collaborative discussions). Moreover, Ameritech's analogy is flawed. These agreed upon minimum performance measures, even if complied with 100%, would only give Ameritech a passing grade. The performance measures still provide plenty of room for Ameritech to achieve excellence by the minimum measures, which as the evidence has shown in the case of parity measures, may actually be quite poor indeed. *See* Proposed Order at 37 (finding that Ameritech provides substandard service to CLECs). Second, the proper criteria by which to evaluate the reasonableness of the amount of Tier 1 and Tier 2 payments is the likelihood that Ameritech's payments would "accrue at meaningful and significant levels when performances are missed" and that it would approach 36% of Ameritech's net return[6]. New York 271 Order[7] at ¶437. As the FCC has recognized, "the level of potential liability under a performance enforcement plan matters, as a plan with relatively low potential liability would be unlikely to provide meaningful incentives to maintain service quality levels," and that "an overall liability amount would be

[5] The number of performance measure tests passed divided by the total number of performance measure tests. Ameritech BOE at 22 (citing ALJ Exhibit 2).
[6] All the parties have agreed that the annual cap would be 36% of net return, Proposed Order at 37, which at this point is around $361.45 million, Proposed Order at 34.
[7] *Application by Bell Atlantic NewYork for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*. CC Docket No. 99-295, FCC# 99-404 (rel. Dec. 22, 1999) hereafter referred to as the "NY 271 Order").

meaningless if there is no likelihood that payments would approach this amount, even in instances of widespread failure." *Id*. at ¶436. There is no likelihood that Ameritech would reach $361.45 million in a year if it pays $2.9 million per month, and therefore little encouragement for it to change its behavior.

Furthermore, that level of payment does not even reach the level of being meaningful or significant given that Ameritech failed over 2,000 performance measure tests in three months. Staff Exh. 2.00 at 61-62 (stating that "existing penalty structures seem wholly inadequate for the level of service provided"); Ameritech BOE at 22 (comparing total "# Tests" to total "# Passed" in table; 17,946-15,850 = 2,096). The evidence presented in this hearing demonstrates that "currently Ameritech provides substandard service to CLECs, often on a frequent and ongoing basis. That evidence also established that Ameritech does not appear to suffer any meaningful consequence as a result of delivering such service." Proposed Order at 37. Therefore, the overall level of payments needs to be increased so that Ameritech does not continue providing subpar performance. Staff's proposal is the best way to increase the level of payments so they reach the level of being meaningful or significant. Staff continues to advocate, that at a minimum Tier 1 and Tier 2 payments need to be tripled, although a higher multiple may be used. Staff IB at 37-38; *see also* Staff Exh. 2.00 at 57, 60-62 (recommending to increase the per-occurrence penalties because Ameritech's behavior persisted over the test months and the penalties seemed "wholly inadequate for the level of service provided" to change its behavior.)..

The *Merger Order* and the evidence presented in this proceeding demonstrate that the remedy plan fails to provide adequate incentives for Ameritech to maintain its level of wholesale service. The *Merger Order* established the commitment of SBC/Ameritech to modify the Texas Plan because the Commission found the Texas Plan to be inadequate, stating that Ameritech had committed to

> import to Illinois the 'Texas Plan' for performance measures and incident-based liquidated damages provisions is responsive to our question. But falls short of what we consider necessary to safeguard our ability to monitor a thriving and dynamic competitive telecommunications market for consumers.
>
> *Merger Order* at §III(I)(2)(h) -- Commission Analysis and Conclusion, p. 217.

While the *Merger Order* does state that the Commission's interest is not to penalize the company, but to assure compliance with the Commission's order, (*id.* at 218) a proper reading of the Commission's statement is that the Commission hoped that the remedies imposed by the remedy plan would provide sufficient incentive that enforcement of any penalties would not be necessary. It does not preclude enforcing penalties against the company for non-compliance. Moreover, the *Merger Order* leaves open the possibility of greater penalties than those available under the Texas Plan, concluding that "with the proper incentives in place, we can be reasonably assured that the conditions we impose will be fulfilled and that the CLECs and end-users will reap the benefits." *Merger Order* at 221. The point is that Ameritech will not be penalized if it complies with the performance measures as agreed.

The evidence demonstrates that the conditions imposed by the *Merger Order* are not being fulfilled under the Existing Remedy Plan (which is the Texas Plan or Performance Remedy Plan Proposed by Ameritech), and that CLECs, and consequently end-users, are enduring the consequences. Proposed Order at 37. The arguments in Ameritech's BOE actually underscore the failings of the Existing Remedy Plan to provide a proper incentive for the Company to provide improved service "in the event that performance continues at unacceptable levels over time." Ameritech BOE at 20.

The table on page 22 of Ameritech's BOE presents data that reflects negligible performance changes for the three months of data presented.[8] Although the Pass Rate in December is slightly greater than November's, and October's, the overall improvement is small.[9] What is significant is that although there is almost negligible increases in the Pass Rate (meaning that the Failure Rate is decreasing) between the three months, the Payments per Existing Plan have increased. Since the number of failures were decreasing, the amount paid should have decreased. The reason the amount Ameritech paid per month increased is due to what Ameritech calls natural multipliers. Ameritech BOE at 20. If Ameritech fails to meet the same performance standard in two consecutive months, the remedy amount escalates in the second month, and if poor performance continues, the payment amount continues to escalate up until the six month. *See id*.; *see also* Direct Testimony of Ameritech witness Salvatore Fioretti, Attachment A, §8.1, Liquidated Damages Table for Tier 1 Measures (showing that the Tier 1 payments increase for failures in consecutive months). Therefore, the table in Ameritech's BOE reflects the fact that most of Ameritech's failures were repeat failures, and that the existing remedy plan provides little, if no, incentive for the company to improve its performance in any noticeable way. If the

[8] Tier 1 tests, which assess performance to individual CLECs, changed from 87.8% in October 2000, to 88.8% in November and 89.5% in December 2000. Ameritech BOE at 22.
[9] the only additional evidence presented by the Company demonstrated a distinct decline in performance in the following spring. *See* Staff Reply Brief at 30.

"natural" multipliers cited by Ameritech (see Ameritech BOE at 20) actually provided incentive for compliance, thereby supporting competition, there should be vastly improved service over time.

As discussed in Staff's BOE, the data in ALJ Exhibit 2 demonstrates that Ameritech can well-afford the remedy payment structure set forth in the Modified Performance Remedy Plan. Staff BOE at 2-5. Under the Modified Remedy Plan Ameritech would pay approximately $16.8 million[10] over three months. Extrapolating those three months of 10-12%[11] failures per month over an entire year, Ameritech would pay approximately $67.2 million[12], which is a number far short of the $361.45 million determined to be an amount likely to provide meaningful incentives to maintain service quality levels.

D. <u>**Evidence Supports Tripling Both Tier 1 and Tier 2 Payments so as to Provide Sufficient Incentive to Ameritech to Provide 'Good' Wholesale Services**</u>

Ameritech argues that there is a lack of factual support for increasing the penalties. Ameritech BOE 18-20. Specifically, it argues that a lack of evidence in this case does not support doubling Tier 1 payments. Ameritech BOE at 18-19. As Staff argued in its BOE, and above, tripling the Tier 1 Payments is reasonable, and that doubling the Tier 1 Payments would have a negative effect on the operation of the plan. Staff BOE at 43-50. Furthermore, Ms. Patrick stated that even if all of Staff's recommended changes are accepted[13], including tripling Tier 1 payments, the annual

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[10] Staff BOE at 3; Ameritech BOE at 22.

[11] The table indicates passage rates between 77.5% and 89.5% which would result in a failure rate of 12.5% to 10.5%. Ameritech BOE at 22.

[12] $67.2 million is $16.8 million multiplied by 4, thereby estimating the annual amount Ameritech would pay.

[13] Staff's recommendations operate as a package, which includes an annual cap of 36% of Ameritech's net revenues, Staff IB at 10, removal of the k-table, *id.* at 7-8, use of a bright-line benchmark test, *id.* at 8,

amounts Ameritech would pay would reach just over $160 million, which is still far short of the total annual cap recommended by the FCC. Staff Ex. 2.00 at 68.

The telecommunications market in Illinois is different than the market in Texas. Given the well-supported finding in the Proposed Order that "currently Ameritech provides substandard service to CLECs, often on a frequent and ongoing basis. That evidence also established that Ameritech does not appear to suffer any meaningful consequence as a result of delivering such service" Proposed Order at 37, the payments for the Remedy Plan must be modified to ensure that Ameritech will not operate in an anticompetitive manner, safeguard the "thriving and dynamic telecommunications market for consumers", *Merger Order* at 217, and that the Commission will "be reasonably assured that the conditions [it] impose will be fulfilled and that CLECs and end-users will reap the benefits", *Merger Order* at 219. For the reasons set forth above, and in Staff's BOE, Staff recommends that the Commission reject Ameritech's arguments, triple Tier 1 and Tier 2 payments, and adopt the recommendations set forth in Staff's BOE.

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use of a single critical value instead of a table, *id.* at 9, tripling of both tier 1 and tier 2 payments, *id.* at 10, and designating all performance measures a "high" priority, *id.* at 9.

3. THE COMMISSION SHOULD ELIMINATE SECTIONS 6.3 AND 6.5 OF THE MODIFIED REMEDY PLAN and REJECT AMERITECH'S INTERPRETATION OF THE COMMISSION'S APPROVAL OF THE TEXAS PLAN

In its BOE, Ameritech makes several assertions that the Commission has "approved" the Texas plan that are incorrect and inappropriate. Ameritech BOE at 9, 10. Ameritech also characterizes its implementation of the existing tariffed remedy plan under Condition 30 as a "voluntary" action. Ameritech BOE at 11. This Commission has never approved the Texas remedy plan or even the performance measures resulting from the collaborative held pursuant to the *Merger Order*. As in cases where a company files a tariff that the Commission does not investigate, the Commission cannot be said to have approved the tariff. *See e.g., Finkel v. Illinois Commerce Commission*, 325 Ill. App. 3d 142, 151, 756 N.E.2d 933, 940 (1st Dist. 2001) ("the ICC need not find rate changes in a pass to file tariff 'just and reasonable.'").

Although Ameritech implemented Condition 30 by the filing of a tariff of a modified Texas plan, it is inaccurate to say that the Commission approved the plan. It is also inaccurate to say that Ameritech's action in implementing the remedy plan was voluntary. Ameritech BOE at 9 ("The purpose of the present proceeding is to consider changes to the voluntary remedy plan implemented by Ameritech Illinois as a condition of the Commission's approval of the SBC/Ameritech merger."). Ameritech acted in accordance with a Commission Order, namely, the *Merger Order*. Failure to tariff the modified Texas plan within 300 days after the *Merger Order* would have subjected Ameritech to hefty penalties, up to $90 million dollars. See *Merger Order* at 261, Condition 30, para. 4. Implementation, therefore, was hardly voluntary.

Ameritech argues that Ameritech's acceptance of the conditions imposed by the *Merger Order* was voluntary and as such, renders the *Merger Order* itself a voluntary agreement of Ameritech and the Commission. Ameritech BOE at 1 ("This docket was opened pursuant to an agreement between Ameritech Illinois and this Commission on which the Commission conditioned its approval of the merger between SBC and Ameritech.") To the contrary, while Ameritech had the option of not going forward with the SBC merger, once Ameritech accepted the Conditions imposed by the *Merger Order,* those conditions became their obligations under the terms of the *Merger Order*.

Moreover, the Commission clearly understood that it had the discretion to unilaterally order the Joint Applicants to abide by conditions that were in the public interest, even if SBC/Ameritech would not agree to such conditions. For instance, the Commission stated: "[T]he Commission finds that the only limitation put upon our discretion is that the conditions we attach be, in our good and informed judgment, of a type necessary to protect the interests of the company and its customers consistent with the interests outlined by Section 7-204(b)." *See e.g.*, *Merger Order* at §III(I) at 155. Thus, if the Commission found that the imposition of a condition is "of a type necessary to protect the interests of the company and its customers," even if SBC/Ameritech disagreed, the Commission had the discretionary authority to impose such a condition upon SBC/Ameritech. The Commission's *Merger Order*, consequently, can hardly be accurately characterized as an "agreement." *See* Ameritech BOE at 19.

In fact, regarding remedy plans, the *Merger Order* expressly provides: "Regardless of whether or not SBC agrees to remedies (e.g., damages, assessments, and credits) associated with one or more Agreed to Standards/Benchmarks in the

Texas collaborative, the Illinois collaborative process is not precluded from considering any proposed remedy or remedies." *Id*. at 263, Condition 30, para. 8. Ameritech, thus, could not preclude from collaborative consideration any proposed remedies. If the collaborative parties could not agree on any particular remedy, then the Commission, in its own discretion, was to decide the issue here in this docket, even if the Commission's decision went against Ameritech's wishes.

As Staff pointed out in its BOE, Ameritech may desire to strengthen its 271 case by characterizing the tariffing of the modified Texas plan as an approval of such plan but that would be both incorrect and irrelevant to this proceeding. In addition, Ameritech includes in it BOE a great deal of rhetoric regarding the FCC's determinations regarding remedy plans in 271 proceedings which are not germane to this proceeding and for that reason alone should be disregarded by this Commission. The requirements relating to 271 approval are different from this Commission's requirements for a remedy plan that complies with its *Merger Order* and, as a result, the FCC's statements regarding 271 remedy plans are irrelevant and should be ignored. Moreover, Ameritech will have ample opportunity in the ongoing 271 proceeding to argue its case that the Texas plan should be used for 271 purposes and need not argue it here.

Ameritech apparently assumes that the Existing Remedy Plan is the plan that is in force through interconnection agreements with certain CLECs. Ameritech BOE at 33 ("CLECs opted into the existing Remedy Plan via a standard amendment to their interconnection agreements.") Staff, on the other hand, believes that the existing plan in force in Illinois today is the Remedy Plan that was tariffed pursuant to Condition 30, and may be incorporated by reference into certain interconnection agreements.

In responding to Ameritech's discussion in the BOE regarding the interplay between the Texas Remedy Plan and remedy plans incorporated into interconnection agreements, Staff notes two errors in the Modified Remedy Plan that were apparently inadvertent carry-overs from the Texas Plan. Sections 6.3 and 6.5 of the Modified Remedy Plan adopted in the Proposed Order appear to be derived from the Texas Remedy Plan. Staff notes that the existing Remedy Plan tariffed in Illinois pursuant to Condition 30 does not include either Section 6.3 or 6.5.

Section 6.3 of the Modified Remedy Plan may be an unintended limitation of the Commission's authority under its other service quality rules. Section 6.3 of the Modified Remedy Plan currently states the following:

> 6.3 Ameritech shall not be liable for both Tier-2 "Assessments" and any other assessments or sanctions under the Commission's service quality rules relating to the same performance.

The Texas commission may have agreed to reduce Tier-2 "Assessments" by the assessments or other sanctions imposed by the Texas commission's service quality rules, but this Commission has not agreed to any such limitation of its authority. Moreover, HB 2900 (Public Act 92-0022) has recently provided the Commission with authority under Section 13-712(c) to impose fines or penalties for violations of service quality standards. 220 ILCS 5/13-712(c). At the time of the Merger Order, this Commission did not have this authority and therefore, this Commission could not have intended at that time that the authority of HB 2900 be limited in this manner.

In addition, Part 730, which is under review in Docket No. 00-0596, currently proposes that the Commission be permitted to impose additional penalties and fines after a hearing wherein the Commission considers the factors identified in Section 13-

712(c). Staff's concern is that the Commission would be unintentionally limiting its newly granted authority derived from Section 13-712(c) if Section 6.3 were to remain in the Proposed Order. In addition, Staff points out that the Commission should not decide issues in this proceeding that would be better handled in the Part 730 proceeding. Finally, as a result of these considerations, Staff recommends that Section 6.3 be deleted in its entirety. In light of Staff's recommendations, Staff would not object to permitting the other parties in this proceeding the opportunity to respond to what appears to be an unintentional incorporation of these Sections 6.3 and 6.5 from the Texas Remedy Plan. As Staff has noted, the existing tariffed Remedy Plan does not include either Section 6.3 or 6.5.

Similarly, Staff recommends the deletion of Section 6.5 of the Modified Remedy Plan. Section 6.5 states the following:

> 6.5 Ameritech and CLEC acknowledge that no later than two years after Ameritech or its affiliate receives Section 271 relief, the Commission's intention is to reduce the number of performance measures subject to damages and assessments by 50% to the extent there is a smaller number of measures that truly do capture all of the issues that are competition-affecting and customer-affecting.

Section 6.5 of the Remedy Plan purports to describe this Commission's intention as to the appropriate resolution of the ongoing 271 proceeding. This language appears to be derived from the Texas Plan and, in the Texas Plan, this language presumably refers to the Texas Commission's decision in its 271 proceedings. Since by law this Commission cannot prejudge the Illinois 271 proceeding before the proceeding is completed, this Section 6.5 cannot legally remain in the Proposed Order, which would be approved by the Commission prior to the resolution of the 271 proceeding. As a result, Staff recommends this section be deleted. Staff does not anticipate that this modification will be controversial but in the interest of fairness would not object to permitting any party objecting to this change to respond.

4. THE COMMISSION SHOULD REJECT AMERITECH'S ARGUMENT TO ELIMINATE THE "K" TABLE

In its BOE, Ameritech takes exception to the Proposed Order's finding that the k-table should be eliminated primarily because it does not adequately address the effect of intrinsic random variation. Staff agrees with the Proposed Order's conclusion that the k-table should be eliminated from the Remedy Plan. Staff believes that the Proposed Order properly addresses random variations. As Staff has explained in testimony and briefs, the effect of random variation is accounted for in statistical analysis by the establishment of an alpha level. Proposed Order at 20-21; Staff Witness Patrick Rebuttal Testimony at 20; Staff Brief at 18; Staff Reply Brief at 13. Staff notes that both it and Ameritech have agreed that a critical value of 5% is the appropriate level of Type I error; that is, there is a 5% probability of making a Type I error, which will provide the necessary level of confidence in determining whether or not parity service has been provided. Staff Reply Brief at 13. That critical value alone can be used to set the remedy amounts; there is no need for an additional "step" or procedure like the k-table to lend Ameritech additional confidence that they need to pay a remedy for their failure to perform parity service. *Id*.

In its BOE, Ameritech first presents "background information" on several topics, including statistical analysis, Type I and Type II Errors as addressed by the existing remedy plan, and the k table. In its review of statistical analysis, Ameritech provides a discussion of hypothesis testing, Type I and Type II error, and size of disparity, but fails to provide a compelling argument supporting the adoption of the k-table. For example, their description of hypothesis testing (Ameritech BOE at 24) merely supports the existing steps of calculating the z-statistic, and comparing that statistic to a critical value to determine whether the performance provided by the Company to competitors is arguably equivalent to the service provided by the Company to itself, or to its retail customers. With that test alone, using the appropriate critical value, Ameritech can determine, with 95% confidence, whether the hypothesis of parity should be accepted or rejected. Staff maintains that not only is the k-table unnecessary but it inappropriately overcorrects for random error. Staff Reply Brief at 13 ("Even if the prevalence of random variation sufficiently justified Ameritech's use of the k-table, the k-table goes beyond eliminating failures caused by random variation.").

Ameritech's review of Type I and Type II errors also serves to undermine its argument that the Commission should retain the k-table. Ameritech Illinois notes, accurately, that Type I and Type II errors represent the risk of falsely rejecting the parity or disparity hypothesis, respectively. Ameritech BOE at 25. Ameritech also notes that the risks of Type I and Type II error are inversely related. *Id*. at 26. Ameritech, however, presents a misleading example to illustrate a particular phenomenon related to Type II error. Ameritech posits a hypothetical situation wherein management instructs their technicians to add a one-hour nap when they process a CLEC repair. Ameritech BOE at 25-26. Ameritech offers to use this hypothetical situation as an example of a particular phenomenon: that the risk of Type II errors increases in the face of small measured differences. Ameritech, however, mischaracterizes this phenomenon, in that the correct characterization is that it is a feature of mathematical statistics that the risk of Type II error, or beta, increases in the presence of small differences between test statistics and critical values. *See* Staff Ex. 2.0 at 53.

Instructing repair technicians to add nap-time to their processing of CLEC orders might lead to a calculated test statistic that is close to the critical value, but this example is hardly a demonstration of the effects of "small" differences on the payment of remedies. First, the difference set out in Ameritech's hypothetical setting is explainable and, therefore, not random. Second, unfortunately, it is the case that such intentional differences can lead to "close calls" in hypothesis testing. These close calls, however, wherein the test statistic is hardly different from the critical value, are more likely to lead to falsely concluding that Ameritech has passed the test, thereby leading to a false rejection of the hypothesis of disparity (the opposite of what Ameritech is positing, i.e., that it would more likely lead to a false conclusion that Ameritech failed the test). Under this setting of "close calls," Ameritech faces less risk of failing a test, and consequently paying remedies, than in settings of large disparities between the test statistic and critical value. Ameritech's own example serves to argue against the need for k-exclusions. If Ameritech is more likely to falsely pass the types of tests suggested by their hypothesized example, they would not need the protections offered by the k-table of excusing themselves from paying remedies.

Similarly, Ameritech's review of the manner in which the existing remedy plan addresses Type I and Type II errors provides little support for retaining the k-table. Ameritech BOE at 26-26. Ameritech borrows heavily from an Affidavit, authored by Dr. Colin Mallows, and filed by AT&T at the FCC in Docket 96-98 ("Mallows' FCC Affidavit").

The passages Ameritech cites for support, however, provide support for the ALJ Proposed Order and not for Ameritech's arguments. Ameritech first notes that Dr. Mallows argued against the use of “reporting averages of performance measures alone,” which provides an argument for the use of a statistical test. Ameritech BOE at 27. The Ameritech performance remedy plan uses a modified z-test for many of its tests, a conclusion that is consistent with Dr. Mallows’ FCC Affidavit. *Id*. This feature of the Ameritech performance remedy plan was hardly modified by the Proposed Order. Ameritech’s describes Dr. Mallows' FCC Affidavit as providing support for setting the risk of Type I error at 5%. The information contained in Dr. Mallows’ FCC Affidavit, however, argues against modifying the Proposed Order, which recommends comparing appropriate statistical tests for parity measures to a fixed critical value, selected to hold the risk of Type I error at 5%. Accordingly, contrary to Ameritech's assertions, there is no need to alter the Proposed Order.

Ameritech’s background review entitled “The K Table” contains misleading arguments. Ameritech hinges its arguments on two incorrect presumptions. The first is that the Mallows FCC Affidavit provides uncontroverted support for the k-table as used in the Ameritech remedy plan. The second is an incorrect usage by Ameritech of mathematical odds.

Contrary to Ameritech’s assertions, the Mallows' FCC Affidavit does not represent a document drafted wholly in support of the existing Ameritech performance remedy plan. While the Mallows' FCC Affidavit advocated an additional step over and above the usual comparisons between test statistic and critical value performed in hypothesis testing, Ameritech has misappropriated Mallow’s theoretical methodology to several facets of their remedy plan.

As noted by Staff at the evidentiary hearings, the Mallows' FCC Affidavit represented one possible solution to a specific theoretical problem. *See* Tr. at 308-310. Ameritech misapplies Mallow's solution to this remedy plan and in a manner that was not intended by Mallows, and was not supported by the evidence adduced in this docket.

The important point to remember is that the effect of random variation is accounted for in statistical analysis by the establishment of an alpha level. Proposed Order at 21-22; Staff Witness Patrick Rebuttal Testimony at 20; Staff Brief at 18; Staff Reply Brief at 13. Application of this principle of correcting for Type I error is made at the level of each individual performance test by comparing a z-statistic computed for the individual test to a critical value, which value has been established to yield the 5% Type I error rate. Ameritech IB at 24; Staff Exhibit 4.0 at 20. Even Ameritech concedes that Type I correction of this sort is standard practice in the industry. Ameritech IB at 26. But the k-table would go a step farther to correct *again* for random variation by applying another statistical computation at the aggregate level. *Id*. Specifically, once the remedy plan calculates the number of individual tests Ameritech has failed, using the Type I correction discussed above, Ameritech's proposed remedy plan throws out these failed individual tests until a threshold is reached. That threshold is derived by use of the k-table established by Ameritech. *See* Ameritech IB at 13-14 for an illustration of this. Simply put, the k-exclusions inappropriately establish a threshold of failures that will not be subject to remedies.

Ameritech is mistaken in its interpretation that the "main basis" for the Proposed Order's rejection of the k-table "is that the CLEC's would receive more money without it." Amer. BOE at 30. As Staff discussed thoroughly in its Reply Brief, Staff maintains that the critical value determined to yield a 5% alpha level, or a 5% probability of making a Type I error will provide the necessary level of confidence in determining whether or not parity service has been provided. Staff Reply Brief at 13. That critical value, in turn, can be used alone to set the remedy amounts. There is no need for an additional “step” or procedure to lend Ameritech additional “confidence” that they need to pay a remedy for their failure to perform parity service.

The ALJs note their explicit agreement with Staff's argument regarding the relationship between the alpha level, the test statistic, and the calculation of penalties. The ALJ's observed, correctly, that the k-exclusions are unnecessary once the appropriate alpha level has been selected for the individual test. Proposed Order at 21. The monetary estimates provided by the ALJs demonstrate, accurately, that Ameritech may face greater remedy payments when the k-table is eliminated. Their presentation hardly equates to basing their entire decision on these increased remedy amounts. Further, as Staff noted in its Initial Brief, the remedy plan should be structured to encourage Ameritech to avoid payment penalties by providing good wholesale service. Staff IB at 36.

Ameritech continues to recite as support for the k-table arguments which Staff has indicated are flawed. While the Ameritech BOE expresses an “expectation” that a “significant number of false failures” will occur, Ameritech has never provided any evidence in support of its expectation. As Staff noted in its Initial Brief (at 19-20), the single example provided by Ameritech contains mathematical errors.[14] In addition, Ameritech has failed to provide any compelling reason for the mathematical necessity for the k-exclusions as they appear in the existing Ameritech remedy plan. Ameritech, moreover, persists in mis-representing odds. For example, Ameritech opines that:

> However small the odds you will reach a given result on any one try, the odds get larger when you get more tries - whatever you are doing, and whatever result you are considering.

Ameritech. BOE at 28.

Staff responded to this erroneous argument in its Reply Brief (at 12). Since Ameritech persists in this flawed argument, however, Staff feels compelled to address it again. In determining the odds of a setting, the odds remain the same, no matter how many tries, or how many throws. In fact, the more you play, the more likely is is that you will lose. See Staff Reply Brief at 12. Ameritech, thus, can out-wait the CLECs, and the Ameritech remedy plan is, in fact, designed to allow them the time and the freedom to do so. *Id*.

Ameritech's rationale for the necessity of the k-table boils down to a single point: if Ameritech were in perfect parity, in the absence of the k-table, it might be forced to pay remedies on a handful of performance measures that were erroneously determined to be performance failures. Staff disagrees. As discussed above, the statistical testing of the Modified Remedy Plan provides sufficient correction for random variation.

[14] *See* the Rebuttal Testimony of Ameritech witness Dr. Levy at 4, wherein Dr. Levy misstates the mathematical odds of rolling "snake-eyes." The correct expression of the odds against rolling snake eyes is 35:1, which calculates to a probability of 0.02778, not ".027778%" as quoted by Dr. Levy. Even rolling the dice multiple times, the odds of the setting will not change, despite Dr. Levy's presentation that snake eyes will show 200 times in 7,000 rolls.

Proposed Order at 21-22; Staff Witness Patrick Rebuttal Testimony at 20; Staff Brief at 18; Staff Reply Brief at 13. Moreover, Ameritech's existing remedy plan has guaranteed that the day of perfect parity will never arrive. By retaining the k-table, Ameritech could likely afford to allow performance to decline below the 90% performance standard emphasized in their BOE.

As noted in its Reply Brief (at 16), Staff doubts that the ultimate goal of the remedy plan is "perfect parity." However, Ameritech's concerns that it may be forced to pay erroneous remedies are exaggerated. If Ameritech ever began to approach a setting that more closely resembled parity, or even passing 95% of its performance measurement tests, it is likely that they will begin to encounter increasing numbers of "close calls." In that event, the possibility of falsely passing the test increases. If Ameritech falsely passes the test then there would be no need for a remedy. The CLECs, in fact, have argued that the remote chance of mistakenly paying remedies due to Type I error only begins to offset the numerous occasions for which Ameritech provides sub-standard service and passes its performance tests.

Given that the Company is far short of providing 95% service, or passing 95% of its tests, it is impossible to know which tests are being failed due to "random error." Statistical tests alone cannot allow Ameritech to distinguish between tests failed due to random error and tests failed due to real disparity. See Staff Reply Brief at 15-16. Therefore, Ameritech's criticism is unwarranted. As noted by Staff in its Reply Brief, "Increasing the number of failures before the application of a remedy does not provide an incentive for better performance, it buffers Ameritech from experiencing the full consequences of its failures." Staff RB at 16.

Ameritech in its BOE also criticizes the Proposed Order for describing the k-table as providing a “forgiveness factor” that reduces the amount of remedies paid. AI BOE at 30. Ameritech argues that “[t]he K table does not ‘forgive’ remedies that are otherwise warranted; it prevents the imposition of remedies that are not warranted.” AI BOE at 31. Staff disagrees. As Staff has amply demonstrated above, the k-table does indeed forgive remedies that otherwise would be warranted. In this brief, Staff has pointed out that the forgiveness of penalties in favor of exaggerated concerns regarding random variation is not justified and is erroneous. For all of the reasons stated above, the Proposed Order is correct in describing the K table as providing a forgiveness factor.

Staff has always advocated a simple straightforward position: if you fail a test, you pay a remedy. Under Ameritech's remedy plan, however, it has little incentive to improve performance. The existing remedy plan allows Ameritech to determine which failures it is not going to pay remedies on. This feature contradicts the *Merger Order*, by undermining the goals of competition. Finally, eliminating the k-exclusions, as provided in the Proposed Order, is a far preferable situation than the alternative presented in the existing Ameritech remedy plan: forgiving penalties erroneously in favor of exaggerated concerns regarding random variation.

5. THE COMMISSION SHOULD NOT IMPLEMENT THE SEVENTEEN MEASURES PROPOSED BY THE ILLINOIS CLECs BUT IMPLEMENT A MINIMUM LEVEL OF SERVICE FOR CERTAIN PARITY MEASURES

In its Brief on Exceptions the Illinois CLECs agree with Staff that the Proposed Order incorrectly dismissed the use of a floor (or minimum level of service) for those measures requiring parity. Illinois CLECs BOE at 12. Staff agrees with the Illinois CLECs that the critical concept is that "the remedy plan must incent Ameritech to provid[e] a minimum level of service quality to CLECs by subjecting Ameritech to remedy payments for failing to meet the minimum service levels," and "that a remedy plan without a parity with a floor permits Ameritech to avoid payment of remedies even when CLECs get terrible service so long as that service is as bad as terrible retail service." *Id*. Staff however does not agree with the seventeen measures the Illinois CLECs have proposed, for the reasons set forth in Staff's Initial Brief. *See* Staff IB at 29.

In its Brief on Exceptions, the Illinois CLECs propose the following replacement language:

> By definition, parity with a floor based on Staff's proposal does not result in requiring Ameritech to provide "superior" service quality to CLECs. The minimum service quality floors proposed by Staff are based on Part 730 requirements. Since Ameritech is already legally obligated to provide to retail customers service quality at the levels set forth in Part 730, we find that using Part 730 metrics as the basis for remedy plan purposes is not requiring Ameritech to provide "superior" quality service.
>
> Illinois CLECs BOE at 15.

Staff agrees with the Illinois CLECs characterization of Staff's proposal as not requiring "Ameritech to provide 'superior' service quality to CLECs", but disagrees with the rationale for rejecting said proposal. Staff's proposal was not to ensure "superior" service, but to ensure that customers who receive service through a CLEC will still receive at least the minimum level of service set forth in Part 730. Staff BOE at 26-36. Part 730 sets a minimum level of service standard for retail services that are most important to providing telephone service to Illinois consumers. Setting a minimum level of service for certain parity measures will serve to prevent Ameritech providing those services to CLECs at a level below what the Commission has set as the minimum level of service a consumer should receive. *Id.* at 34-36. This cannot happen if the Commission is to fulfill the General Assembly's intent that "every telecommunications carrier meet minimum service quality standards in providing basic local exchange service on a non-discriminatory basis to all classes of customers." 220 ILCS 5/13-712(a).

Even though Part 730 establishes minimum levels of service for retail services, it is still appropriate to use Part 730 standards as a floor for wholesale services because such usage will promote competition. If parity alone provides the standards for wholesale service, Ameritech could then provide poor wholesale service across the board (to both its retail customers and CLECs) which would inhibit the CLECs ability to compete. As the incumbent LEC, Ameritech can withstand for a longer period of time its retail customer dissatisfaction with poor service quality than can CLECs who are trying to gain a foothold in the market. *See* Staff RB at 17-24. The remedy plan is an Order of the Commission fulfilling its Condition 30 of the *Merger Order.* In the *Merger Order,* the Commission acting out of what is in the public interest (220 ILCS 7-204(f)) requires Ameritech to establish a remedy plan for Illinois based on the Texas remedy plan. The purpose of the payments made by the remedy plan is to ensure that Ameritech will not operate in an anticompetitive manner, to safeguard the "thriving and dynamic telecommunications market for consumers", *Merger Order* at 217, and that the Commission will "be reasonably assured that the conditions [it] impose will be fulfilled and that CLECs and end-users will reap the benefits", *id*. at 219.

Additionally, the penalties under Part 730 are for failure to provide minimum level of service to its retail customers, whereas the payments pursuant to the remedy plan are for failure to provide wholesale services at a level below the minimum level of service carriers are to provide to Illinois consumers. The purpose of the payment under the remedy plan is wholly different than penalties under Part 730, and is related to a failure of a wholly different type of service than what is required under Part 730. Therefore, requiring remedy payments for violating a minimum level of service is not requiring Ameritech to pay twice for the same violation.

If parity with a floor is rejected then Ameritech could provide poor service to its retail customers that would violate the standards of Part 730. As the wholesale provider, Ameritech's provisioning to the CLECs of poor service at parity would prevent the CLECs from complying with the minimum level of service required in Part 730. As a result, the concept of parity (without a floor) would undermine the Commission's minimum standards set forth in Part 730 because it would allow both Ameritech and the CLECs to provide substandard service, albeit at parity.

For the reasons set forth above, and in Staff's BOE, Staff recommends that the Commission reject the Illinois CLEC's and Ameritech's arguments, and adopt the recommendations set forth in Staff's BOE.

II. CONCLUSION

For the foregoing reasons, we request the Commission accept Staff's recommendations in their entirety as set forth herein and in its Brief on Exceptions..

Respectfully submitted,

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Sean R. Brady
Nora A. Naughton
Counsel for the Staff of the
Illinois Commerce Commission

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Illinois Commerce Commission
Office of General Counsel
160 N. LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877